



**Regulatory
Transparency
Project**
Unlocking Innovation & Opportunity

Ending Sex Discrimination in Campus “Sexual Misconduct” Proceedings

Race & Sex

Linda Chavez (Chair)

Roger Clegg

Stuart Taylor, Jr. (Unpaid Consultant)

This paper was the work of multiple authors. No assumption should be made that any or all of the views expressed are held by any individual author. In addition, the views expressed are those of the authors in their personal capacities and not in their official/professional capacities.

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I. Introduction

Education Secretary Betsy DeVos and her advisors have made a good (but alarmingly slow) start at ending the Obama Administration’s use of federal regulatory power to attack the due process and free speech rights of university students and faculty accused of sexual harassment and assault.

But DeVos has only begun to undo the damage done by the previous administration; has done little so far to dial back federal pressure on schools to overregulate campus sex life and speech; and has had little impact so far on the deeper problem of systematic discrimination by universities against the accused. Meanwhile, the expected date for publication of proposed rules to ensure fairness has been repeatedly delayed, from March to September 2018 — a year after DeVos announced the start of a notice-and-comment rulemaking last September.

Almost all those accused and found guilty of sexual assault are males, as are most of those accused of sexual “harassment” — often for constitutionally protected speech. This pattern of injustice was well under way before the Obama Administration effectively made anti-male discrimination mandatory in campus sex proceedings in the name of enforcing Title IX — thereby requiring systematic violations of that same 1972 law.

The injustice will continue indefinitely unless and until DeVos completes and vigorously enforces muscular, detailed final Title IX rules requiring fair treatment¹ of both parties in campus cases.

These assertions may seem implausible, especially in the current “#metoo” atmosphere, to readers who recall that the main purpose of the 1972 law was to end our long history of discrimination against women and girls in education. But in the context of student-on-student accusations, at least, college and university campuses are unlike the workplace, due to the ideological bias against accused students that pervades campuses and the lasting effects of the Obama Administration mandates.

In 2011,² 2014,³ and 2015,⁴ the Education Department’s Office for Civil Rights (OCR) issued “guidance” documents that effectively required more than 7,000 universities and colleges to use specified procedures to respond to sexual misconduct allegations and designate thousands of “Title IX coordinators” to enforce them in concert with OCR. Announced with no public notice or opportunity for comment, these dozens of pages of decrees pressured and to some extent required schools to use grotesquely biased campus tribunals, a virtual ban on meaningful cross-examination of complainants, a minimal “preponderance of the evidence” burden of proof, and other rules to stack the deck against accused students — and effectively to presume guilt.

¹ References in this paper to the need for due process are shorthand designed to include the need for fundamental fairness in procedures for adjudicating alleged sexual misconduct at private as well as public schools. While only the latter are subject to constitutional due process rules, private as well as public schools are subject both to Title IX’s ban on sex discrimination and to contractual obligations to provide fundamental fairness.

² U.S. Dept of Education, Office for Civil Rights, Dear Colleague Letter on Sexual Violence (April 4, 2011) (2010 “Dear Colleague” letter).

³ OCR, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014).

⁴ OCR, Dear Colleague Letter on Title IX Coordinators (April 24, 2015).

Most universities executed the Obama guidance — and added procedures even more unfair than those that OCR explicitly required — with a zeal driven by ideology as well as by OCR’s threats to take away their federal money. The resulting rules “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation,” as 28 Harvard law professors wrote in an [eloquent indictment](#)⁵ in 2014.

Indeed, in a stunning collective judicial rebuke to many campuses’ unfair treatment of students accused of sexual misconduct, courts have issued at least 102 rulings against universities since 2011 compared with 88 rulings in their favor. This imbalance is even more striking than indicated by the numbers, since these rulings went against many decades of extremely broad judicial deference to university disciplinary decisions. While many of the federal rulings were preliminary, they typically prompted schools to settle cases to avoid risking the definitive defeats and public embarrassment that were likely to follow.⁶

In addition, in the first public remarks on the campus due process debate by a member of the Supreme Court, Justice Ruth Bader Ginsburg said (in a public conversation with journalist Jeffrey Rosen): “The person who is accused has a right to defend herself or himself, and we certainly should not lose sight of that . . . There’s been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that’s one of the basic tenets of our system, as you know: everyone deserves a fair hearing.” Asked whether some of these criticisms were valid, Ginsburg replied, “Do I think they are? Yes.”⁷

Her words, though temperate, were especially telling, coming from a liberal icon who was long the nation’s leading feminist lawyer.

This is not to deny that there have been many real, violent student-on-student rapes at universities. Nor is it to deny that discrimination against female complainants persists at some schools, especially the handful where big-time football or basketball players who bring lots of money are accused. But on today’s campuses, discrimination against accused males is the rule. And in DeVos’s words, just as one rape or “aggressive act of harassment” is one too many, “one person denied due process is one too many.” Also relevant, as the Supreme Court has stressed,⁸ is the fact that effective due process protections in noncriminal cases are most critical when the impact and “risk of an erroneous deprivation” is great.

⁵ Elizabeth Bartholet et al., “Rethink Harvard’s sexual harassment policy,” *Boston Globe* (Oct 15, 2014).

⁶ For a full listing of these cases, see

https://docs.google.com/spreadsheets/d/1CsFhy86oxh26SgTkTq9GV_BBrv5NAA5z9cv178Fjk3o/edit#gid=0
(university setbacks);

https://docs.google.com/spreadsheets/d/1fKLo3wPeOQHcVBOBVEs7zDp1tAcXMkFwS88q7-t_kUA/edit#gid=0
(university victories).

⁷ Jeffrey Rosen, “Ruth Bader Ginsburg Opens Up About #metoo, Voting Rights, and Millennials,” *The Atlantic*, 15 Feb. 2018, <https://www.theatlantic.com/politics/archive/2018/02/ruth-bader-ginsburg-opens-up-about-metoo-voting-rights-and-millennials/553409/>.

⁸ *Mathew v. Eldridge*, 424 U.S. 319, 335 (1976).

Fortunately, DeVos appears to be preparing to issue forceful new, legally binding regulations in 2019, after a complicated and protracted “notice and comment rulemaking” process that began last September. (As noted above, it seems to have been more protracted than necessary, which casts doubt on whether the administration will follow through with forceful rules to ensure fairness.) She has already taken some important steps. Last June, the Education Department’s Office of Civil Rights (OCR) [ended the Obama practice](#) of turning every allegation of sexual harassment into a sweeping federal investigation of all allegations university-wide over the past three years. On September 7, DeVos publicly denounced biased campus “kangaroo courts” and [called for fairness](#) to both complainants and accused students. Around two weeks later, OCR rescinded the Title IX “guidance” that the Obama Administration had used to specify effectively guilt-presuming procedures for the nation’s colleges and universities to use.⁹

The DeVos OCR also issued in September “interim guidance” to replace the rescinded Obama guidance until the rulemaking process is completed. The most publicized provision reversed the Obama demand that schools use the minimal “preponderance” burden of proof in sexual misconduct cases and allowed them to use a more reliable standard (such as “clear and convincing evidence”) if they do so in other disciplinary cases. The interim rules also required schools to avoid “sex stereotypes or generalizations”; to give accused students detailed, timely written notice of the allegations against them; to use investigators “free of actual or reasonably perceived conflicts of interest and biases for or against any party”; and to produce a written report “summarizing the relevant exculpatory and inculpatory evidence,” rather than simply looking for evidence that would support the accuser’s version of events, as some schools have done.¹⁰

Even these modest steps toward fairness drew [frenzied denunciations](#) from [virtually every Democratic politician](#) who has spoken publicly about them and hostile or at best cool reactions from university officials. Almost all schools have [refused to implement](#) DeVos’s interim guidance, portions of which are not mandatory and portions of which are vague enough to leave room for evasion. As a result, DeVos has not yet been able to change things very much on the ground, where campus tribunals operate.¹¹

II. Notice and Comment Rulemaking

DeVos foreshadowed more important and lasting regulatory changes when she vowed in September that “we will launch a transparent notice-and-comment process to incorporate the insights of all parties in developing a better way,” as provided in the Administrative Procedure Act of 1946 (APA).¹² Her emphasis on the need to protect the due process rights of accused students contrasted

⁹ See, e.g., Stuart Taylor, Jr. and KC Johnson, “End the Bias in Campus Sexual Misconduct Tribunals” (*Real Clear Politics*, Feb 5, 2018), https://www.realclearpolitics.com/articles/2018/02/05/end_the_bias_in_campus_sexual-misconduct_tribunals_136186.html.

¹⁰ *Id.*

¹¹ See KC Johnson, “Democrats Defend the Dear Colleague Letter” (*Academic Wonderland*, Sept 23, 2017); KC Johnson, “House Democrats, DeVos, & Due Process” (*Academic Wonderland*, Sept 12, 2017).

¹² See *Real Clear Politics* above.

starkly with the approach of the Obama Administration, which *never* stressed the importance of due process and rarely even acknowledged the possibility that an accused student might be innocent. While the Obama Administration addressed its mandatory “guidance” at K-12 school districts as well as colleges and universities, we think that the rules adopted by the current administration should apply only to higher education institutions. Different rules might be appropriate for K-12 schools.

DeVos’s respect for the careful, APA-endorsed rule-making process also contrasted with the Obama Administration’s bypassing of that process, which was [probably unlawful](#).¹³ DeVos has eschewed this “rule by letter” approach, as she calls it. “We want to build a rule that’s enduring and seen by all as fair,” a top DeVos aide explains. “It’s a steady, thoughtful process, not a rush.” OCR plans to publish proposed rules in the next few months and allow several more weeks for the filing of comments. Those will include bitter attacks by the dozens of women’s groups and leftists who have denounced any approach to campus discipline that falls short of embracing the “believe the victim” dogma that pervades the campus left and much of the Democratic Party. OCR must then respond to the comments; make appropriate revisions in the proposed rules; seek input on those from OMB, Justice, and perhaps other agencies; and issue final rules, which must be signed by the president to take effect.

There will no doubt be court challenges. But the final rules will have the force of law unless and until provisions are struck down by the courts or overhauled by the next administration in another protracted rulemaking or (less likely) by Congress.

III. Proposed Rule Reducing Federal Pressure to Overregulate Sex and Free Speech

The authors of this paper believe that universities should be permitted, and perhaps required, to stop adjudicating alleged sex crimes and (if the complainant so desires) refer such allegations to law enforcement; that they base their disciplinary decisions in such cases on law enforcement decisions; and that they conduct their own campus disciplinary adjudications of complaints involving sex only if the university certifies that in its view the alleged facts of the case do not appear to violate the criminal law of the state.

For example, a criminal indictment for rape would presumably prompt (as it has traditionally prompted) the accused student’s school immediately to suspend him unless and until all criminal charges are dropped or he is found not guilty. And a complaint by a student who says that he or she was drunk and thus claims to have lacked legal capacity to consent would be adjudicated by the university only if it first certified that in its opinion the allegations would *not* amount to a prosecutable crime under the law of the state.

Would such a policy change by the OCR be lawful? We think so, although candor requires an acknowledgment that a little-noticed 1992 statute could be construed as suggesting the contrary.¹⁴ In

¹³ See Jacob E. Gersen, “How the Feds Use Title IX to Bully Universities” (commentary), *Wall Street Journal*, January 24, 2016, <https://www.wsj.com/articles/how-the-feds-use-title-ix-to-bully-universities-1453669725>.

¹⁴ The Higher Education Amendments of 1992 provide that colleges and universities must adopt “a statement of policy” that “shall address . . . (ii) Possible sanctions to be imposed following the final determination of an on-

addition, in dozens of lawsuits by students challenging disciplinary action for alleged “sexual misconduct,” lower courts have held or at least assumed that the Supreme Court’s 1999 decision in *Davis v. Monroe County Board of Education*,¹⁵ as construed by OCR since 2001, requires campus disciplinary proceedings in at least some cases involving allegations of student-on-student sexual misconduct.

Davis, which involved harassment of a fifth-grade girl by a classmate, held by 5 to 4 that a private Title IX damages action may lie against a K-12 school board that receives federal money in cases of student-on-student harassment. In *dicta*, the majority added that in the higher education setting, the rules might be somewhat different: “A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy . . . and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.”

The four dissenters said that “the majority seeks, in effect, to put an end to student misbehavior by transforming Title IX into a Federal Student Civility Code.” Evidently assuming that *Davis* would be extended to higher education, the dissent also sounded an ominous and prescient warning: “At the college level, the majority’s holding is sure to add fuel to the debate over campus speech codes that, in the name of preventing a hostile educational environment, may infringe students’ First Amendment rights. . . . Indeed, . . . schools presumably will be responsible for remedying conduct that occurs even in student dormitory rooms [and] may well be forced to apply workplace norms in the most private of domains.”

Adding an important limiting principle, the *Davis* majority held that schools are liable only where the school authorities are “deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”

The Clinton and Obama Administrations obliterated this limiting principle. First, the Clinton Administration, on its last day in office in 2001, issued “guidance” for federal fund recipients that wholly ignored the “pervasive” element of *Davis*. Indeed, OCR maintained that for purposes of OCR’s investigatory role, “a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.”¹⁶

campus disciplinary procedure regarding rape, acquaintance rape, or other sex offenses, forcible or nonforcible [and] (iv) Procedures for on-campus disciplinary action in cases of alleged sexual assault, which shall include a clear statement that— (I) the accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding; and (II) both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault.”

[https://en.wikisource.org/wiki/Page:United States Statutes at Large Volume 106 Part 1.djvu/654](https://en.wikisource.org/wiki/Page:United_States_Statutes_at_Large_Volume_106_Part_1.djvu/654).

¹⁵ 526 U.S. 619 (1999).

¹⁶ U.S. Dept. of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (January 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf/>.

A decade later, the Obama Administration treated this OCR disregard for Supreme Court precedent as a mandate for launching sweeping federal investigations of students' sex lives at thousands of universities. It also pressured all universities receiving federal money to hire squadrons of Title IX coordinators, the more the better, to regulate the sex lives of their students in the guise of policing sexual assault and harassment — a wrong-headed “guidance” that DeVos should revoke as she has revoked others.¹⁷

In a law review article headed *The Sex Bureaucracy*, Harvard Law Professors Jacob Gerson and Jeannie Suk Gerson called the Obama policy “the steady expansion of regulatory concepts of sex discrimination and sexual violence to the point that the regulated domain comes to encompass ordinary sex. . . . Over time, federal prohibitions against sex discrimination and sexual violence have been interpreted to require educational institutions to adopt particular procedures to respond, prevent, research, survey, inform, investigate, adjudicate, and train. The federal bureaucracy required nongovernmental institutions to create mini-bureaucracies, and to develop policies and procedures that are subject to federal oversight. That oversight is not merely, as currently assumed, of sexual harassment and sexual violence, but also of sex itself.”¹⁸

The current administration can and should slow down the campus sex police juggernaut. At the very least, DeVos should apply the limiting principle of *Davis* by providing in the final rules that are being developed that a federal investigation is warranted only where evidence suggests that the college authorities are (in the words of the *Davis* majority) “deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” A policy of that kind would shrink greatly the distended federal footprint in campus sex life.

The administration can and should also go further, by adopting as its own policy, at least in the higher-education context, Justice Kennedy’s dissenting suggestion in *Davis* that only “a clear pattern of discriminatory enforcement of school rules” — and not merely failing to take corrective action against one or two harassers over whom a college has some control — “could raise an inference that the school itself is discriminating.”

IV. Proposed Procedural Rules for Campus Sex Cases

Some of the rules that would be appropriate for student-on-student encounters (in addition to those in the “interim guidance”) are summarized below, with explanatory comments interspersed. (A complete list, including rules for cases involving faculty members, would be much longer.) These suggestions are derived from proposed legislation, proposals by various lawyer and other groups, comments by lawyers and professors who have handled campus discipline cases, and other sources.

¹⁷ U.S. Dept. of Education, Office for Civil Rights, *Dear Colleague Letter on Title IX Coordinators* (April 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

¹⁸ Jacob Gerson and Jeannie Suk Gerson, “The Sex Bureaucracy,” *California Law Review* 104, no. 4 (2016), pp. 881-948, <http://scholarship.law.berkeley.edu/californialawreview/vol104/iss4/2>.

It would probably be appropriate to exempt relatively minor accusations from these rules by requiring that they be used only in cases in which the highest possible penalty is expulsion, suspension, or another penalty of comparable gravity.

This list includes rigorous trial-type procedures — streamlined and simplified for the campus setting and for students who cannot afford lawyers — to ensure fairness, impartiality, and sensitivity to both accused and complainant. It begins with four rules that are absolutely critical to fairness. They would prohibit the types of process that are currently typical at many and perhaps most campuses.

1. **Right to counsel.** Schools should be required to tell both complaints and accused students at the outset of the process that they have a right to have a lawyer at their own expense, or another advocate, represent them at every stage of the process. Schools should also be encouraged but not required to provide free legal counsel for accused students who cannot afford to pay.
 - Most or at least many schools now make it hard for an accused student to present an effective defense by prohibiting his lawyer — if he can afford one — from addressing the campus tribunal or questioning witnesses. This also interferes with truth-finding.
2. **Right to unbiased process.** Schools should be required not only to give every complainant and accused student an unbiased investigation and a fair, face-to-face hearing before an impartial and independent panel of at least three impartial adjudicators, who must (as provided in the interim guidance) be “free of actual or reasonably perceived conflicts of interest and biases for or against any party.” They should also specify that officials employed by or associated with the schools’ Title IX office may not act as adjudicators or have a role in deciding appeals because of their strong incentives to please complainants’ rights advocates.
 - Many schools now use panels that are neither impartial nor independent, and whose members have job-related incentives to find accused students guilty.
3. **Right to cross-examination.** Schools should be required to give both the accused student and the complainant a right to meaningful and nondisruptive direct cross-examination of all witnesses, including the opposing party, on all contested issues of fact. The questions may be asked by the party, by his or her lawyer, or by another chosen advocate, except that a complainant who objects to a personal, face-to-face confrontation with an accused student or his lawyer has a right to answer his questions on video if she so requests.
 - This would reverse the Obama OCR’s strong opposition to meaningful cross-examination of complainants while accommodating complainants who might be traumatized by a face-to-face confrontation with the accused. The overwhelming majority of schools now prohibit or greatly restrict direct cross-examination, which the [Supreme Court](#) (quoting a legal scholar) has described as “the greatest legal engine ever invented for the discovery of truth.”¹⁹ Similarly, the U.S. Court of Appeals for the [Sixth](#)

¹⁹ See, e.g., *California v. Green*, 399 U.S. 149 (1970).

- [Circuit](#)²⁰ recognized, in a case filed by an accused student from the University of Cincinnati, that “cross-examination takes aim at credibility like no other procedural device” and “safeguard[s] accuracy.” The unanimous three-judge panel castigated the university for assuming that cross-examination only benefited the accused student: “In truth, the opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused.”)
4. **Right to publicly disclosed and nondiscriminatory training of personnel.** Schools should be required both to make public all materials used to train investigators and adjudicators in campus Title IX tribunals and to ensure that the training does not discriminate against either complainants or accused students and does not generalize about which are more likely to be truthful.
- Almost all schools now cloak their training materials in secrecy, even from accused students. The materials currently used by many or most schools [stack the deck](#)²¹ against the accused by suggesting [with no serious scientific foundation](#)²² that false allegations of rape are very uncommon; that any internal inconsistencies in the complainant’s account or contradictions of other evidence should be attributed to “the effects of trauma”; and that rigorous questioning of complainants is forbidden as “blaming the victim.”

Other important rules that universities should be required to adopt include the following:

- In deciding individual cases, schools must distinguish carefully among allegations of (1) violations of the criminal law as defined by the state where the campus is located; (2) sexual harassment as defined in these rules; and (3) any lesser form of sexual misconduct specified in the school’s policies.²³

As DeVos has said, many schools enforce “ambiguous and incredibly broad definitions of assault and harassment.” And students have been found responsible for “sexual misconduct” in secret proceedings for actions or words that a reasonable person would consider innocuous and then branded in the campus gossip mill as sexual assaulters or rapists.

- Panel members must be instructed that an accused student is presumed innocent until proven guilty.
- Sexual harassment means any unwelcome conduct of a sexual nature that would be considered highly offensive by a reasonable person in the position of the complainant, except that constitutionally protected speech may not be treated as harassment.

Many schools now prohibit or punish constitutionally protected speech as “harassment”; this was required by the Obama OCR’s blatantly unconstitutional, now-rescinded fiats that *all*

²⁰ *Doe v. University of Cincinnati* (6th Cir Sept 25, 2017).

²¹ See KC Johnson and Stuart Taylor, Jr., “The Title IX Training Travesty” (*Weekly Standard*, Nov 10, 2017).

²² Emily Yoffe, “The Bad Science Behind Campus Response to Sexual Assault” (*Atlantic* Sept. 8, 2017).

²³ This provision would diverge from the Clery Act’s requirements for reporting aggregate data to the government, which do not distinguish alleged sex crimes from alleged noncriminal violations of often absurdly broad college disciplinary codes. But we see the divergence as justified by the need to avoid unwarranted harm to the reputations of individual accused students, who are not identified in Clery reports.

“[unwelcome conduct](#) [or speech] of a sexual nature” on campus is sexual harassment,²⁴ even if it would [not offend a reasonable person](#).²⁵

- Isolated acts of unwelcome student-on-student conduct or speech do not amount to a “hostile environment,” or put the school in violation of Title IX, unless they show deliberate indifference by the school to known acts of harassment that would be seen by a reasonable person as severe, pervasive, and objectively offensive.

As noted above, this is consistent with the leading Supreme Court decision on student-on-student sexual harassment, [Davis v. Monroe County Board of Education](#), in 1999. But the [Obama OCR](#), like the [Clinton OCR](#) before it, brushed aside the Court’s definition and trampled the freedom of speech by decreeing that even an isolated instance of unwelcome conduct or speech could create a “hostile environment” if “severe,” and thereby require the school to punish the alleged harasser.

- Both complainants and accused students have a right to timely and detailed written notice not only of all allegations (as suggested in the interim guidance) but also of all material evidence, including exculpatory evidence.
- An investigator must not also serve as an adjudicator in the same case, and neither may play any role in deciding appeals of that case.

This would prohibit the common practice of having the same officials who rule on innocence or guilt consider appeals of their own rulings as well as the deeply problematic system in which a single person serves as lead investigator, prosecutor, judge, and jury, which was promoted by the Obama OCR and is still used by many schools.

- The standard of proof to find an accused student guilty of allegations that he committed a sex crime or sexual harassment or to subject him to expulsion or suspension must be “clear and convincing evidence.” (This is optional under the interim guidance.)
- Before finding an accused student responsible for alleged conduct that may constitute a sex crime, the school must prove both that the complainant did not consent and that the accused did not reasonably believe she had consented.

Many schools now essentially put the burden on the accused to prove that the complainant consented, and reconsented, at every stage of the sexual encounter.

- If the accused claims she did not consent to sexual activity because of incapacitation by alcohol or drugs, the school must prove not only that she was drunk or under the influence, but also that she was incapacitated as defined by the law of the state, and that the accused should have known this.

Many schools treat simple drunkenness, or even mild intoxication, as incapacitation.

- An accused student has a right to a meaningful appeal of any adverse finding.

²⁴ 2011 Dear Colleague Letter, above.

²⁵ “Re: DOJ Case No. DJ 169-44-9, OCR Case No. 10126001” (Letter from Anurima Bhargava and Gary Jackson to Royce Engstrom and Lucy France), May 9, 2013, <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>.

The Obama OCR required schools that allow accused students to appeal guilty findings also to allow complainants to appeal not guilty findings, which in the criminal justice system would be unconstitutional double jeopardy. DeVos, who generally favors parallel rights for complainants and accused students, has not so far questioned this policy. But she should. Schools have overturned, based on political calculations rather than evidence, panel decisions in favor of accused students who appear in fact to have been innocent. The harm done by punishing an innocent student without allowing him to appeal is far greater than the harm done to a victim who may not appeal an erroneous finding of innocence, because no appeal could undo the crime the victim has suffered.

- Schools must be permitted to mediate between parties and help them settle cases on an informal basis (a practice forbidden by OCR since 2001).

Nothing in these rules shall be construed as limiting schools' ability to provide counseling, medical, academic or housing accommodations or other services to alleged victims of sexual misconduct.

V. The Need and Legal Justification for the Proposed Rules

“Any school that uses a system biased toward finding a student responsible for sexual misconduct . . . commits discrimination,” DeVos has said.

A majority of courts have concluded that even overwhelming bias against accused students is not sex discrimination and thus does not violate Title IX. Still, a compelling caveat by a three-judge panel of the U.S. Court of Appeals for the Second Circuit should be borne in mind. It [refused in July 2016 to dismiss a student's Title IX claim against Columbia University](#)²⁶ for anti-male discrimination. It ruled that a “university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, notwithstanding that the motive for the discrimination did not come from ingrained or permanent bias against that particular sex.”

Among the decisions allowing Title IX sex discrimination claims by accused males to proceed was a May 14, 2018 ruling from the bench by US. District Judge John McConnell (an Obama appointee) that such a claim could proceed against Johnson & Wales University, of Providence, RI, because on the pleadings, the campus procedures were so stacked against the accused male that the judge could “find no reason at all why the result was Mr. Doe's expulsion. The only inference [is] . . . gender played a role.”²⁷

The universities' practice of sex discrimination against males in many current campus cases is far more active, direct, intentional, and transparently motivated by bias than was the elementary school's sex discrimination against the female victim in the Supreme Court's *Davis* case. The Court found no active discrimination or anti-female animus on the part of the elementary school. Its misconduct

²⁶ *Doe v. Columbia University*, No. 15-1536 (July 29, 2016).

²⁷ KC Johnson, “The Fallout from Weaponizing Title XI,” *Minding the Campus*, May 18, 2018, <https://www.mindingthecampus.org/2018/05/18/the-fallout-from-weaponizing-title-ix/>.

consisted of being “deliberately indifferent to sexual harassment, of which they ha[d] actual knowledge, that [was] severe, pervasive, and objectively offensive”; it thereby “subjected [the victim] to discrimination” by failing to protect her from “the discriminatory misconduct” of the harasser. Indeed, there was no evidence in *Davis* that the school would have done more to end the harassment had the harasser been the female and the victim the male.

In the current university context, by contrast, evidence of anti-male bias has been plentiful in a large number of campus sex proceedings in recent years. Begin with the fact that almost all of the accused students who have been disciplined have been male. This shows far more than a nearly 100 percent disparate impact on accused males, which by itself would not violate Title IX.²⁸ It also — when combined with the other evidence noted below — shows intentional discrimination fueled by pro-female, anti-male bias in many cases. The other evidence includes the large percentage of cases in which the schools’ basis for discipline has been the alleged incapacitation of the accuser by alcohol — even when the evidence showed and the adjudicators knew that the accused student was no less intoxicated and no less incapacitated than the accuser and thus that she was equally at fault (if fault there was).²⁹

And yet the females are almost never disciplined. This discrimination against males cannot be explained away by pointing out that typically the female accuser has told her story to campus sex officials before the accused male tells his story. That should be irrelevant when, as is so often the case, the campus authorities know very well by the time that they impose discipline that the female accuser was no more intoxicated than the accused male.

In such a case, the nondiscriminatory approach would be to discipline both — or neither. But the typical attitude on campus was reflected by the testimony of Duke University Dean of Students Sue Wasiolek, when asked by an accused student’s lawyer whether, if the accused and accuser were both drunk, they would “have raped each other and [both be] subject to expulsion.” Wasiolek’s response: “Assuming it is a male and female, it is the responsibility in the case of the male to gain consent before proceeding with sex.”³⁰

Many of the campus cases that have come to light through litigation are also replete with evidence of pro-female, anti-male bias on the part of the Title IX coordinators and other university officials and consultants who investigate and adjudicate such cases. The evidence of bias includes all of the (usually secret) “training” materials for investigators and adjudicators that have been made public. As noted above, they are egregiously slanted toward presuming the guilt of accused males and the truthfulness of female accusers.³¹

²⁸ Cf. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

²⁹ See, e.g., *The Campus Rape Frenzy* 1-8 (Amherst case); 88-89 (Vassar case).

³⁰ *Id.* 83.

³¹ In refusing to dismiss an accused student’s lawsuit against the University of Pennsylvania in September 2017, for example, U.S. District Judge John Padova, of Philadelphia, held that “allegations regarding training materials and possible pro-complainant bias on the part of University officials set forth sufficient circumstances suggesting inherent and impermissible gender bias to support a plausible claim that Defendant violated Title IX.” *John Doe v. The Trustees of the University of Pennsylvania*, Civil Action No. 16-5088,

The vast majority of these campus officials — estimates range above 70 percent — are themselves women. Many appear to have been motivated to seek such jobs by ideological sympathy for women claiming to be victims. Many and perhaps most have been trained both in their course work and on the job to believe in the “rape culture” narrative. As demonstrated in a book by Wendy McElroy, herself a rape victim: “The rape culture is a particularly vicious fiction because it brands half the human race —males, and especially white males — as rapists or rape facilitators. This slander would be denounced as hate speech if it were directed at any other class of human being, such as blacks, gays, or women. But slandering men is tolerated and applauded because the falsehood is dressed up as justice.”³² And during the 2015-2016 academic year, for example, Brown University chose eight females and two males for the undergraduate student contingent on a committee that handled all adjudications of sexual misconduct accusations.³³

Discrimination against accused males is also driven by guilt-presuming procedures that universities adopted in all-too-willing compliance with Obama Administration orders, and that they continue to enforce through legions of ideologically biased sex bureaucrats that that administration told them to hire. While discrimination by schools against female complainants was no doubt common a few decades ago, the norm in campus sex proceedings in recent years has been discrimination against the accused student, who almost always is male.

Harvard Law professors Elizabeth Bartholet, Nancy Gertner, Janet Halley, and Jeannie Suk Gersen — all with records of championing equal rights for women — filed with OCR in August 2007 a compelling, seven-page white paper entitled “[Fairness for All Students Under Title IX](#)”³⁴ about universities’ unfairness to accused students.

“Definitions of sexual wrongdoing on college campuses are now seriously overbroad,” the four professors cautioned. “They go way beyond accepted legal definitions of rape, sexual assault, and sexual harassment. They often include sexual conduct that is merely unwelcome, even if it does not create a hostile environment, even if the person accused had no way of knowing it was unwanted, and even if the accuser’s sense that it was unwelcome arose after the encounter. The definitions often include mere speech about sexual matters. They therefore allow students who find class discussion of sexuality offensive to accuse instructors of sexual harassment. They are so broad as to put students engaged in behavior that is overwhelmingly common in the context of romantic

<https://kcjohnson.files.wordpress.com/2013/08/penn-mtd.pdf>. The training materials included “tips” such as “[t]he fact that a complainant recounts a sexual assault somewhat differently from one retelling to the next may reflect memory processes rather than inattentiveness or deceit”; “[f]alse allegations of rape are not common”; and “research places the [false rape report] rate in the general population between 2% and 10%.” (In fact the only researchers who have made such claims have been completely discredited.) Middlebury College’s training urges adjudicators to “start by believing” the accuser, while asking themselves whether the accused student is “who he said he is.” See, e.g., KC Johnson and Stuart Taylor, Jr., “The Title IX Training Travesty,” *The Weekly Standard*, November 10, 2017; Emily Yoffe, “The Bad Science Behind Campus Response to Sexual Assault,” *The Atlantic*, September 8, 2017.

³² Wendy McElroy and Brian Tomlinson, *Rape Culture Hysteria: Fixing the Damage Done to Men and Women* 19-20.

³³ *The Campus Rape Frenzy* 255.

³⁴ <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1>.

relationships to be accused of sexual misconduct. Overbroad definitions of sexual wrongdoing are unfair to all parties, and squander the legitimacy of the system.”

“The procedures for enforcing these definitions are frequently so unfair as to be truly shocking. . . . Title IX officers have reason to fear for their jobs if they hold a student not responsible or [fail to impose] a harshly punitive sanction.”

The prevalence of discrimination against accused students has also been detailed by the more nearly 100 judicial decisions noted above and by more than a dozen distinguished journalists and scholars, as well as by KC Johnson’s and Stuart Taylor’s 2017 book, [The Campus Rape Frenzy](#), and books by [Laura Kipnis](#), and [Robert L. Shibley](#). The journalists include [Emily Yoffe](#), [Cathy Young](#), [Ashe Schow](#), and [Robby Soave](#). The scholars include the 24 Harvard law professors mentioned above; [16 Penn Law School professors](#); politics professor [R. Shep Melnick](#) of Boston College; and others. Many injustices have also been exposed by the [Foundation for Equal Rights in Education](#) (FIRE), the nation’s leading campus civil liberties group, and [Families Advocating for Campus Equality](#) (FACE), among other groups.

Many of the same writers have also discredited both the myth that one in five college women is sexually assaulted while enrolled and the deceptive claims by many activists and leftist politicians that 92 to 98 percent of accused students are guilty, so campuses need not much worry about fair procedures. In fact, [the most reliable federal statistical surveys](#)³⁵ suggest that perhaps 1 in 100 college women is raped and another 2 or 3 in 100 is subjected to a lesser sexual assault, a term broad enough to include an unwanted touch on a clothed rear end. And not a single serious scientific study supports the claims that almost all accused males are guilty. The best available evidence suggests that it is impossible to estimate with confidence the percentage of accused students who are factually guilty of sex crimes both because campus decisions are so unreliable and because law enforcement authorities consider the evidence inconclusive in *more than half* of sex crime allegations. In many cases, even a careful, unbiased, fair, professional fact-finding process cannot reliably separate the innocent from the guilty.

This is all the more true now that sexual promiscuity — often fueled by alcohol — between casual acquaintances and even near strangers has become the norm for many if not most female as well as male students.

These proposed rules may strike many as too prescriptive for a conservative administration that has vowed to cut back on federal regulation. And the authors of this paper wish that we could think of a better way to protect the constitutional rights of independent-minded college students. But we can’t. The courts, limited to case-by-case decisions, cannot do it on a broad scale. And Congress, never a champion of the rights of accused people, will not do it. Nor will the states.

³⁵ Sofi Sinozich and Lynn Langton, *Special Report: Rape and Sexual Assault Victimization among College-Age Females, 1995–2013* (N.p.: U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, December 2014).

The paradox is that nothing short of muscular federal regulation will stop our politically correct universities from trampling the liberty of students and faculty.